

1-1-2012

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Recommended Citation

Rebecca Licavoli Adams, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems*, 9 HASTINGS RACE & POVERTY L.J. 1 (2012).

Available at: https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol9/iss1/1

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California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?

REBECCA LICAVOLI ADAMS*

Introduction

On January 1, 2011, California Code of Civil Procedure section 1161.3 (Section 1161.3) came into effect.¹ This statute provides an affirmative defense for a victim of domestic violence against eviction from a rental unit resulting from an act of domestic violence committed against them.² This issue potentially affects the lives of an astonishing number of American women; research estimates there are four million incidents of domestic violence in the United States each year, and one in three women will experience domestic violence in their lifetime.³ Domestic violence is a leading cause of homelessness in major cities.⁴ Victims commonly lose their housing because of lease provisions that allow eviction due to a violent or criminal act occurring in their unit,⁵ or because of noise complaints from other tenants.⁶ Some landlords evict because they fear being

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1. See CAL. CIV. PROC. CODE § 1161.3 (West 2011).

2. *Id.*

3. Archana Nath, *Survival or Suffocation: Can Minnesota's New Strangulation Law Overcome Implicit Biases in the Justice System*, 25 LAW & INEQ. 253, 256 (2007).

4. See generally U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA CITIES, 75 (2001), available at [http:// www.usmayors.org/ucsm/hungersurvey/2001/hungersurvey2001.pdf](http://www.usmayors.org/ucsm/hungersurvey/2001/hungersurvey2001.pdf).

5. See generally Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249 (2007).

6. *Id.*

held liable if an abuser were to harm a neighboring tenant.⁷ Many landlords simply do not want the violence, hassle, noise, or complaints that can come with renting to domestic violence victim. After a victim is evicted, she may have difficulty finding a new rental due to credit issues or a criminal history directly relating to the violence against her.⁸ However, Section 1161.3 prohibits landlords from evicting victims for acts of violence committed against them, and allows victims to raise Section 1161.3 as a defense to an unlawful detainer action.⁹

However, it is not yet clear how the court will interpret many of the provisions of Section 1161.3. After analyzing the statute and possible interpretations of the provisions, it is clear that Section 1161.3 may not actually protect victims in the way advocates expect. Some statutory provisions lack an understanding of the nature of domestic violence; for example, the statute presumes a victim will be able to keep the batterer from visiting the home.¹⁰ Other provisions provide exceptions to the statute that will drastically decrease the number of victims benefiting from Section 1161.3. As a result, the statute may actually cause more harm than good for victims dealing with housing issues. Advocates should be aware of these potential problems, and pay heed to traditional and proven strategies in assisting clients with eviction issues.

It is important to have a general understanding of domestic violence to appreciate the housing issues victims face, and the limitations of Section 1161.3. In Part I, I will provide an overview of domestic violence, including common myths and information on victim behavior. In Part II, I will provide an overview of the housing issues victims face. In Part III, I will analyze Section 1161.3, offer suggestions on how California courts could interpret the provisions, and discuss problems victims might face when they attempt to use the statute's defense. In Part IV, I will offer recommendations about traditional and proven strategies that may better serve the needs of victims facing eviction.

7. Ross, *supra* note 5.

8. See Eliza Hirst, Note, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 133 (2003).

9. See CAL. CIV. PROC. CODE § 1161.3(e) (West 2011).

10. See MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN 40 (1992).

I. An Overview of Domestic Violence

Domestic violence, also referred to as intimate partner violence, took root in the social, political, and economic systems of patriarchal societies emphasizing male dominance, power, and control over women.¹¹ Domestic violence is commonly defined as a pattern of coercive behavior that includes the physical, sexual, economic, emotional, and psychological abuse of one person by another.¹² The abuser is often attempting to achieve and maintain power and control over his partner.¹³ Generally, domestic violence occurs between people that have or had an intimate, romantic partnership, regardless of whether they are married or have ever lived together.¹⁴ Although domestic violence occurs in all types of intimate relationships, most victims of intimate partner violence are women; some research reports that up to eighty-five percent of victims are women.¹⁵

Although victims themselves come from all walks of life, their experiences with abuse can be remarkably similar.¹⁶ Batterers engage in physical abuse, including kicking, punching, and hitting, or in sexual abuse or rape.¹⁷ A victim may suffer financial abuse, where the abuser controls all household money, or be coerced into acquiring debt that destroys the victim's credit.¹⁸ Sometimes the most damaging violence is emotional or psychological abuse.

11. See generally Karla M. Digirolamo, Symposium, *Myths and Misconceptions About Domestic Violence*, 16 PACE L. REV. 41, 43–44 (1995); R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 Victimology 426 (1978) (reprinted in LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 185, 186 (Beverly Balos & Mary Louise Fellows eds., 1994)) (stating that domestic violence is "a form of behaviour which has existed for centuries as an acceptable, and, indeed, a desirable part of a patriarchal family system within a patriarchal society").

12. Digirolamo, *supra* note 11, at 44.

13. *Id.*

14. See, e.g., CAL. FAM. CODE § 6211 (West 1993); FLA. STAT. ANN. § 741.28(3) (West 1997) (these statutes provide examples of the different types of relationships in which domestic violence occurs).

15. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEPT. OF JUSTICE, INTIMATE PARTNER VIOLENCE 2 (2000). Because of these statistics, I generally refer to the victim using female pronouns and descriptors in this Note, and to the batterer using masculine pronouns. Domestic violence does occur in all types of relationships, and even a male can be victimized by a female batterer. The protections in Section 1161.3 are available to both male and female victims.

16. See Digirolamo, *supra* note 11, at 45.

17. *Id.*

18. *Id.*

Domestic violence is a crime of control.¹⁹ To gain this control, abusers will systematically destroy their partners' sense of self-worth and self-esteem.²⁰ The goal of this behavior is to instill fear in the victim, often isolating them from friends, family and the community, leaving the victim with nowhere to turn for help.²¹ After repeated incidents of abuse, victims become incapable of realizing that there is an alternative to the abusive environment, or find attempts to secure assistance largely unsuccessful.²² Most victims are suffering from repeated incidents of abuse over a period time.²³

To understand the housing issues that victims face, it is important to be familiar with other common problems that are related to intimate partner violence. In the following sections, I will address some of these problems, such as the legal response to domestic violence. I will also counter the common myths that surround women and domestic violence, and look at the experience of the often forgotten victims of intimate partner violence — the children.

A. The Legal Response to Domestic Violence: Past and Present

For much of history, society did not see domestic violence as a social problem. Until the late nineteenth century, husbands were legally permitted to physically "chastise" their wives.²⁴ By the end of the 1800s, most states had criminalized wife beating, but courts

19. See John C. Nelson et al., *Domestic Violence in the Adult Years*, 33 J.L. MED. & ETHICS 28, 29 (2005).

20. See Digirolama, *supra* note 11, at 45.

21. *Id.* at 46.

22. See generally LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 72 (3d ed. 2009) (explaining her theory of Learned Helplessness; when a repeatedly abused woman realizes that she cannot control the violence in her life, she becomes psychologically trapped in her relationship, unable to escape the abuse). Although most scholars believe that Walker's theories adequately describe some battered women, not all victims display this learned helplessness. However, though some women do actively seek help to escape their batterers, their attempts are often unsuccessful, due to ineffective and inadequate social services, or batterers' attempts to sabotage their efforts. Whether a victim is psychologically paralyzed, or is unable to secure the assistance she needs to escape the abuse, the result is the same; she is stuck in a violent relationship. See LEE H. BOWKER, *ENDING THE VIOLENCE* 62, 75, 87 (1986) and LEE H. BOWKER, *BATTERED WOMEN'S PROBLEMS ARE SOCIAL, NOT PSYCHOLOGICAL IN CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 154 (Richard J. Gelles & Donileen R. Loseke eds., 1993).

23. See Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 567 (2007).

24. Nath, *supra* note 3, at 257.

did not treat domestic violence as a true social crime.²⁵ Instead, domestic violence was seen as a private family matter that courts should not be involved in.²⁶ Police rarely arrested the abuser in domestic dispute; rather, the police told the abuser to walk around the block to “cool off” before returning home.²⁷

Despite law enforcement’s slow reaction, the legal response began to change in the 1970s. This was largely the result of a grassroots movement from community domestic violence advocates.²⁸ This effort focused not only on establishing shelters and services for victims of domestic violence, but also on increasing government funding of community services and lobbying to gain protection for women through the legal system.²⁹ As a result of intensive political participation, civil protection orders became more available to victims in many states during the late 1970s, and many jurisdictions adopted more aggressive arrest and prosecution policies against perpetrators of domestic violence.³⁰ Over time, attorneys and advocates developed innovative legal strategies, such as the use of state and federal fair housing laws to address issues of housing evictions.³¹ State and federal statutes addressing domestic violence and the legal strategies that advocates use to protect victims are not immune to criticism. Yet they can be seen as examples of the progression from society’s view of domestic violence as a private family matter, to a crime for which the state’s legal intervention is appropriate.

B. Confronting and Perpetuating Myths of Domestic Violence: Victim Behaviors

In the past several decades, law enforcement and the broader legal system have shown an increased commitment to providing services and protection to victims of domestic violence. However, there are still dangerously prevalent myths surrounding victims of domestic violence. These stereotypes prevent proper responses to

25. Nath, *supra* note 3, at 258; Reva B. Siegel, “The Rule of Love”: Wife Beating As Prerogative and Privacy, 105 YALE L.J. 2117, 2130 (1996).

26. See Nath, *supra* note 3, at 258.

27. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662 (2004).

28. *Id.* at 1666.

29. *Id.*

30. *Id.* at 1667.

31. See Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 377, 381 (2003).

intimate partner violence from the community and individuals in the legal system.³² A pervasive and persistent myth is that victims somehow cause the violence against them, and that if the relationship were really hurting them, they could always leave the abusive relationship.³³

i. Remaining in the Relationship

Perhaps the most damaging myth surrounding domestic violence is that a victim would simply leave the abusive relationship if the violence were truly "bad."³⁴ Since women choose not to leave, many continue to believe they should not be afforded any special legal "privileges," including protective housing laws. In reality, victims may stay in the relationship for a variety of pragmatic reasons; financial dependence on the abuser, fear that the abuser will hurt her or keep her children from her if she tries to leave, or simply because she has no other place to go.³⁵ Due to psychological abuse, victims may believe that they are powerless to stop the abuse and that there is no escape from the relationship.³⁶ Additionally, the abuser has likely isolated the victim from friends and family, so the victim may not have anyone available to help, or to attempt to dispel this alarming thinking.³⁷

ii. Fear of Separation Abuse

Many victims have a frightening and valid reason for staying in an abusive relationship. More often than not, their abuser has likely threatened to harm the victim if the victim tries to leave. The abuser often becomes most violent and dangerous when the victim decides to leave or does leave the relationship.³⁸ It is not uncommon for abusers to use threats to attempt to keep their victim from leaving; he may say that he or the police will take her kids from her, that she will get arrested too, or that he will damage her property or kill her,

32. Nath, *supra* note 3, at 259–60.

33. See Melanie Frager Griffith, Note, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 161–62 (1995).

34. See generally WALKER, *supra* note 22.

35. See Kit Kinports, Symposium, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 168 (2004).

36. *Id.*; WALKER, *supra* note 22, at 72.

37. See Kinports, *supra* note 35.

38. *Id.* at 158; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991).

the pets, or the children, or he may violently and physically attempt to keep her from leaving.³⁹ Statistically, the violence, commonly referred to as separation assault or separation abuse, escalates when the victim decides to leave, and often after she does actually leave.⁴⁰ This strong motivation for a victim to stay in an abusive relationship is distressingly common. One study found that seventy-three percent of battered women requesting emergency medical care were injured by the abuser after leaving him.⁴¹ Another study showed that at least half of women who leave abusive relationships are followed, harassed and attacked by their abusers.⁴² Because of this, deciding to stay in the relationship may be a victim's practical decision to preserve her safety. With this information, it is easier to understand why a victim may continue allowing her abuser to return home, despite facing possible eviction.

iii. Recantation of Allegations of Abuse and Returning to the Batterer

Recantation is one of the most common victim behaviors and one of the most difficult to understand. In this situation, law enforcement has become involved in the abusive relationship, and the victim has initially cooperated and been forthcoming with police and prosecutors, then, the victim suddenly recants earlier testimony of abuse.⁴³ The victim may claim that they invented the abuse, or simply refuse to testify.⁴⁴ The victim often returns to her abuser, a fact that is astonishing to people who believe that with the help of law enforcement, the victim finally had her "ticket out" of the relationship. Understandably, this causes advocates, courts, judges, and law enforcement incredible amounts of frustration, and any sympathy or empathy towards the victim diminishes. This frustration is reflected in the provisions of many statutes designed to provide protection to survivors of abuse. For example, victims can lose the eviction protections provided by Section 1161.3 if they

39. Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN'S L.J. 1, 25 (2001).

40. *Id.*

41. Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1343 (2010).

42. See Mahoney, *supra* note 38, at 64.

43. See Jay A. Abarbanel, Comment, *In Light of Crawford v. Washington and the Difficult Nature of Domestic Violence Prosecutions, Maryland Should Adopt Legislation Making Admissible Prior Acts of Domestic Violence in Domestic Violence Prosecutions*, 39 U. BALT. L. REV. 467, 471-72 (2010).

44. *Id.*

continue to allow their abuser to visit or return to their home.⁴⁵ Yet, this is an incredibly common behavior; studies estimate that eighty to ninety percent of victims will recant at some point.⁴⁶ Victims recant for many different reasons: they may have been confronted with the financial reality of living without the abuser, received threats from the abuser that the victim does not feel they can be protected from, or she may want the children to continue to have a relationship with the abuser.⁴⁷ Recanting and remaining in the relationship may be frustrating victim behavior, but for many women, it is the result of a calculated decision, based on what she knows about their abuser, to manage the violence in their life and ensure their safety.⁴⁸

C. Children and Domestic Violence

Children are the often forgotten victims of domestic violence. Aside from emotional and possible physical damage to children, if a victim is evicted due to domestic violence, her children also become homeless. When victims are physically or sexually abused by their partners, children are at risk of psychological damage from witnessing the assault.⁴⁹ Children may suffer from accidental injuries in attempts to stop abuse, or by being in the vicinity of abuse.⁵⁰ Some research indicates that children who witness domestic violence may engage in violent behavior as adults.⁵¹

Some victims may want nothing more than to separate completely from their abuser. When children are involved, however, achieving a separation is complex. The victim usually cannot achieve a clean break; in most cases, courts will not allow it. Generally, courts will allow the abuser to have some contact with his children, unless there is evidence of child abuse.⁵²

Statutory and judicial decisions that create difficulties for

45. See CAL. CIV. PROC. CODE § 1161.3(b)(1)(A) (West 2011).

46. Abarbanel, *supra* note 43.

47. See Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 368 (1996).

48. See generally Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232 (1993).

49. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 83--84 (2001).

50. *Id.*

51. *Id.* at 6.

52. Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?* 47 UCLA L. REV. 813, 830 (2000).

victims also create issues for their children. In some jurisdictions, children may be removed from an otherwise fit parent and placed in foster care when there has been domestic abuse.⁵³ Because of the myths surrounding domestic violence, many individuals commonly blame the victim for their plight, but most will admit that children are truly innocent victims that need protection from our legislators and courts. However, the way to protect children is to protect their victimized mothers as well.⁵⁴

In light of this information, it is easy to comprehend why a woman may stay with or return to her abuser. There is a large body of research dating back several decades supporting this understanding of the nature of domestic violence relationships.⁵⁵

53. See Weithorn, *supra* note 49, at 29; The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 854-56 (2000) (citing the policies of child protective services to remove children from domestic violence victims on the basis of "neglect", i.e., "failure to protect" the children from exposure to the domestic violence, without providing appropriate services to the victims or children).

54. See generally SUSAN SCHECHTER & JEFFREY L. EDLESON, IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES 1994, available at <http://www.mincava.umn.edu/documents/wingsp/wingsp.html> (last visited August 21, 2011).

55. See generally LENORE WALKER, THE BATTERED WOMAN (1979) cited with approval in Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 170-75 (2004) (explaining the BWS theory, criticisms of the theory, and discussing alternative theories about battering relationships). In 1979, psychologist Walker introduced her theory of the "Battered Woman Syndrome." Walker described the effects of intimate partner violence, and observed many characteristics that victims share, such as low self-esteem and passivity. Walker found that in many relationships that involve abuse, there is a "cycle of violence" that batterers follow; a tension building stage, an acute battering incident, followed by loving apologies and promises that it will never happen again. Walker set forth a theory of learned helplessness; as a result of physical and psychological abuse, victims eventually learn that they cannot control the violence, and believes it is unavoidable, and that there is no escape from the relationship. As a result of the manipulative and abusive efforts of her batterer, a woman becomes literally trapped by her own mind and her abuser is likely to have isolated her from friends and family, so she may not have anyone around to help, or to attempt to dispel this alarming thinking. Walker's influential work had an effect in the courts as well; it was very commonly used to support a self-defense claim for victims that had hurt or killed their abusers. The use of Battered Woman Syndrome in the court has fallen out of popularity, and is criticized because it implies that victims have an illness, and that it may not accurately describe the experience of all abused women. Despite this, Walker's theories have provided a helpful framework in understanding many women's experience of domestic violence, and they remain influential in the field. Other theories explain that some women do not display the behaviors as explained by Walker, however, they are still essentially trapped in battering relationships. Some researchers explain that battered women do in fact seek help, but services are unavailable, or her batterer intentionally sabotages any efforts she makes to leave the relationship. See EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED

Despite this understanding, there is a substantial and fundamental misunderstanding of the effects of intimate partner violence, and the common behavior of victims in the legal system. Victims will not receive proper support or protection from law enforcement as long as this misunderstanding persists. Strong legislative intervention is needed to address many domestic violence issues. Specifically, intervention in the eviction protection laws, which will be discussed later, is important because housing is a particularly difficult issue for victims. In the next section, I will discuss some of the specific, housing related issues that victims deal with, and also the courts' and legislators' responses to these issues.

II. Common Housing Issues for Victims of Domestic Violence

Domestic violence is a traumatic experience many women face that does not stay within the confines of the relationship; the violence can touch every part of her life. A devastating consequence of domestic violence is the effect it has on a victim's housing arrangements. Research has shown that fifty percent of homeless women and children are escaping from domestic violence.⁵⁶ Women often become homeless as a result of their abuser's behavior and violent incidents.⁵⁷ Landlords, from both public and privately owned housing, often have zero-tolerance violence policies enabling them to evict an entire family if any violence or other crime occurs in the unit.⁵⁸ Some jurisdictions enact chronic nuisance laws allowing them to evict a tenant if law enforcement has been called to a unit over a certain number of times.⁵⁹ An abuser's actions may offend quiet enjoyment rules, or may place other tenants at risk, allowing a landlord to evict.⁶⁰

Domestic violence can also cause difficulties for victims to

WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11-25 (1988). See generally Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003) (providing discussion about the uses of Battered Woman Syndrome in the court).

56. K.J. WILSON, *WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE* 204 (1st ed. 1997).

57. See generally U.S. CONFERENCE OF MAYORS, *supra* note 4; Hirst, *supra* note 8, at 132-33.

58. See *Infra* notes 78, 86 and accompanying text.

59. See generally Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1181-82 (2008).

60. See Ross, *supra* note 5, at 251.

qualify for rental housing. Although violence may escalate to a point when fleeing a home is necessary for a victim's safety, long-term leases may cause victims to continue living in misery.⁶¹ Women often are married to and live with their batterers; when they reach the point of leaving the relationship, they may have difficulty removing the abuser from the shared household.⁶²

A. Chronic Nuisance Laws

Generally, chronic nuisance laws are generally city policies that impose fines on property owners based on the number of times police services are called to their property.⁶³ The purpose of these laws is to recover the costs of providing excessive police services.⁶⁴ However, chronic nuisance laws increase housing difficulties for victims. These laws discourage victims who are homeowners, often jointly with their abusers, from calling the police for help after or during an abusive incident. Victims know they will receive a bill for law enforcement services if they request assistance over the allotted number of times.⁶⁵ Chronic nuisance laws are slightly different in each jurisdiction, but in at least one jurisdiction, homeowners are billed if law enforcement visits the dwelling more than three times in a sixty day period.⁶⁶ This extra expense can devastate a family that is already struggling financially.

Additionally, the bill can severely compromise a victim's safety; her batterer likely did not want her to call the police, and incurring a debt on top of this may serve as an excuse for another incident of abuse.⁶⁷ Police may even inform the victim in front of the abuser that if they call for help again, they will be fined or evicted.⁶⁸ These laws can have a greater impact on victims who rent their homes. Landlords are required to abate the nuisance when they are fined under these laws or risk facing financial penalties.⁶⁹ Landlords usually evict tenants who require constant police assistance to abate

61. See generally MELIAH SCHULTZMAN, NATIONAL HOUSING LAW PROJECT, DOMESTIC VIOLENCE AND HOUSING: A MANUAL TOOLKIT FOR CALIFORNIA ADVOCATES 49 (2009), available at <http://nhlp.org/files/NHLP%20Domestic%20Violence%20%20Housing%20Manual.pdf>.

62. *Id.*

63. Fais, *supra* note 59, at 1181.

64. *Id.*

65. *Id.* at 1199–2000.

66. *Id.* at 1190.

67. *Id.* at 1202.

68. *Id.* at 1181.

69. Fais, *supra* note 59, at 1201.

this nuisance. Some of the statutes actually require that the landlord evict the tenant, or else landlords risk losing their rental dwelling permit.⁷⁰ Moreover, the statutes seemingly encourage landlords to carefully screen potential tenants, and to reject them if they believe the prospective tenant may increase police activity on the property.⁷¹

Legislators purportedly enacted chronic nuisance laws to target homes where repeated drug-related activity occurs.⁷² Most of the statutes exempt law enforcement visits that result from crimes committed by a stranger.⁷³ However, there are examples of chronic nuisance laws that were enacted with domestic violence in mind. For example, when Coaldale, Pennsylvania enacted a chronic nuisance ordinance, a reporter summarized the public discussion by stating:

It's always disheartening for police officers to get calls that a boyfriend is beating up a girlfriend, and then the girlfriend drops the charges within a few days. It's more frustrating when the offenders repeat the process over and over. . . . In addition, it's a big waste of taxpayers' dollars when police have to respond to nuisance calls and then to court without the benefit of cooperation from those who complained in the first place.⁷⁴

The local newspaper in Coaldale reported that the Chair of the Council Police Committee stated that the committee's actual intent in supporting the chronic nuisance ordinance "was to target victims of domestic violence who refuse to 'follow through' with the prosecution of their partners."⁷⁵ Fortunately, other jurisdictions exhibit an understanding of domestic violence and the unique difficulty that victims face under these ordinances by expressly exempting domestic violence from their purview.⁷⁶ Otherwise, these ordinances usually do not make any exceptions for domestic violence,⁷⁷ such as the Pittsburgh, Pennsylvania's⁷⁸ and Lancaster,

70. *Id.* at 1181-82.

71. *Id.* at 1195.

72. *Id.* at 1185.

73. *Id.* at 1188.

74. Ron Gower, *Police Calls: Responsibility Will Be Required in Coaldale*, TIMES NEWS, Mar. 13, 2006, at 1.

75. Fais, *supra* note 59, at 1191.

76. *Id.* at 1223-24.

77. There does not appear to be any mention of domestic violence *within* any city's ordinance. However, in at least one jurisdiction, a police reference guide explaining the provisions of the ordinance does indicate that domestic violence calls are not considered nuisance calls. Compare CITY OF CINCINNATI POLICE DEP'T, CPD PROCEDURE GOVERNING CHRONIC NUISANCE PREMISES ORDINANCE ENFORCEMENT 2 (2006), available at

California's statutes,⁷⁹ essentially ensuring housing difficulties for victims in these jurisdictions.

B. Zero Tolerance or One Strike Violence Policies

Zero tolerance violence policies are common provisions in both public and private housing leases. Public housing is government subsidized for low-income tenants, and may consist of an entirely government operated complex, or a private building which accepts tenant vouchers and are partially funded by the government.⁸⁰ In 1988, Congress added a zero tolerance policy to housing law as a result of rampant drug activity in public housing. The policy stated that every public housing lease would:

[p]rovide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.⁸¹

The Supreme Court upheld this policy in 2002, holding that housing authorities have the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.⁸²

It is easy to imagine what such a policy could mean for victims of domestic violence; they would face eviction every time they suffered an incident of abuse, because they would be held responsible for the criminal actions of the batterer. The victim may be even less inclined to seek law enforcement protection, instead preferring to suffer alone just to prevent the landlord from discovering the situation. Advocates lobbied passionately against this policy and its subsequent approval by the courts stating that "[w]omen are not engaging in criminal activity when they are beaten

http://www.cincinnati-oh.gov/police/downloads/police_pdf15064.pdf (excluding domestic violence calls from chronic nuisance tally), *with Cincinnati, Ohio, Municipal Code § 761-7 (2006)*, available at <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35> (no mention of domestic violence).

78. Fais, *supra* note 59, at 1190.

79. LANCASTER, CAL., CODE § 8.52 (2008).

80. Fais, *supra* note 59, at 1209, n.143.

81. 42 U.S.C.A. § 1437d(l)(6) (West 2006).

82. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

or abused in their home. Victims of domestic violence are not trying to threaten the health, safety or well-being of their neighbors.”⁸³ This problem was remedied in 2005 with the reauthorization of the Violence Against Women Act (“VAWA”), in which Congress noted the devastating impact this policy had on victims.⁸⁴ VAWA expressly forbids housing authorities from applying the zero tolerance policy to “criminal activity directly relating to domestic violence . . . engaged in by a member of a tenant’s household or any guest or other person under the tenant’s control.”⁸⁵ It is relatively easy for a victim to show that she suffered abuse by producing a protective order, police report, or court record. Alternatively, she can produce a signed affidavit from herself, an attorney, domestic violence service provider, or a medical professional.⁸⁶ Additionally, VAWA allows a landlord to bifurcate a lease to evict only the abuser.⁸⁷ However, landlords can still evict the victim when they “can demonstrate an actual and imminent threat to other tenants.”⁸⁸

It is important to note that the VAWA protection only applies to victims living in federally subsidized public housing; it does not provide any protection for the vast numbers of victims in private housing. Private leases often include a zero tolerance violence policy, leaving a victim vulnerable to eviction if their partner assaults them or destroys property.⁸⁹ In many cases, landlords chose to enact these policies for the protection of other tenants.⁹⁰ In many states, including California, “landlords are under a duty to exercise reasonable care to protect tenants against foreseeable criminal acts of third parties.”⁹¹ A landlord may evict a victim because of the batterer’s propensity to violence; even if the victim has ended the

83. Hirst, *supra* note 8, at 141.

84. 42 U.S.C.A. §14043e(4) (West 2006).

85. 42 U.S.C.A. § 1437d(l)(6) (West 2006); 42 U.S.C.A. § 1437f(c)(9)(C)(i) (West 2006); 42 U.S.C.A. § 1437f(o)(7)(D)(i) (West 2006).

86. Meliah Schultzman, Address to Domestic Violence Law class at UC Hastings, (Oct. 19, 2010).

87. 42 U.S.C.A. § 1437d(l)(6)(B) (West 2006); 42 U.S.C.A. § 1437f(c)(9)(C)(ii) (West 2009); 42 U.S.C.A. § 1437f(o)(7)(D)(ii) (West 2011).

88. 42 U.S.C.A. § 1437d(l)(6)(E) (West 2006); 42 U.S.C.A. § 1437f(c)(9)(C)(v) (West 2009); 42 U.S.C.A. § 1437f(o)(7)(D)(v) (West 2011).

89. For an example of a typical zero tolerance crime policy, *see* Residential Lease for the Enclave at Adobe Creek Apartment Complex, “Zero Tolerance Crime Policy” at 10 (on file with author). This lease for a private, corporate-owned complex located in Petaluma, California provides; “Residents, any member of the Resident’s household, or a guest, invitee or other person under the control of the Residents shall not engage in criminal activity . . . on or near the Residential community or Leased Premises.”

90. Ross, *supra* note 5, at 252.

91. Ross, *supra* note 5, at 252.

relationship, the batterer may return to attack the victim, and may harm other tenants in the process, thereby exposing the landlord to liability.⁹² Having a domestic violence victim in the building is a risk many landlords are unwilling to take. Some states, including California, enacted a defense to evictions in private housing, similar to VAWA's protections, but many of these statutes do not offer enough protection.⁹³

C. Breach of the Covenant of Quiet Enjoyment

Landlords can also be liable to other tenants for a breach of the covenant of quiet enjoyment.⁹⁴ In California, absent an express provision, tenants have an implied right to quiet enjoyment of the premises in their leases.⁹⁵ If landlords believe that domestic violence could breach this covenant, leading to liability to other tenants, they may evict or refuse to rent to the victim in the first place.⁹⁶ A domestic assault or argument is likely to be noisy, and could make other tenants fearful. Thus, a landlord may be unwilling to risk potential liability, and instead choose to evict a tenant that has suffered loud incidents of domestic violence.

D. Difficulties in Securing Housing

Financial abuse is a common type of domestic violence so victims may also have trouble securing housing. A batterer often takes control of household finances, and coerces the victim to run up debt from unpaid bills or credit cards, destroying her credit rating thereby making it difficult for the victim to be approved for a rental property.⁹⁷ Previous eviction proceedings may also appear on the victim's credit report.⁹⁸ Victims may also have criminal records as a result of abuse. For example, victims may be arrested after an assault when law enforcement is unable to determine the primary aggressor.⁹⁹ Sometimes victims may have criminal convictions

92. *Id.*

93. See generally CAL. CIV. PROC. CODE § 1161.3 (West 2011) (the statute provides some protections against eviction, but also provides many exceptions); *Infra* n.111.

94. Ross, *supra* note 5, at 255.

95. *Id.*

96. *Id.*

97. Hirst, *supra* note 8, at 135.

98. SCHULTZMAN, *supra* note 61, at 14.

99. Michaela M. Hoctor, Comment, *Domestic Violence As a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 683 (1997). Hoctor explains

because their abuser coerced them into criminal activity, or the victims may have used drugs or alcohol to cope with their abuse.¹⁰⁰ These criminal convictions can potentially bar victims from renting.

E. Additional Housing Issues

A victim may face issues that are unrelated to eviction despite having secured housing.. For example, a victim may have to relocate to escape future abuse. However, she may have signed a long-term rental agreement making her responsible for all rent due until the end of the lease if she moves out early.¹⁰¹ Fortunately, California has enacted Civil Code § 1946.7, which permits survivors of domestic violence, sexual assault, or stalking, who have restraining orders or police reports, to end their leases early without owing additional rent.¹⁰² Under this statute, a victim is required to give a landlord a written thirty-day notice of her intent to vacate, and the victim will only be responsible for the final month's rent.¹⁰³ The victim must provide her landlord a restraining order or police report, dated within the past sixty days, verifying the domestic violence.¹⁰⁴ The landlord must refund her security deposit in the same manner as if she had completed the lease.¹⁰⁵ Unfortunately, many victims and even some landlords do not know about this protection, which may prevent victims from relocating to a safer place.¹⁰⁶ Conversely, in some instances the victim may wish to remain in her current home and request that the court remove her abuser from the lease.¹⁰⁷ California law generally requires that the court name all parties to the lease in an eviction action, which makes it nearly impossible to

that mandatory arrest provisions are becoming increasingly common in many jurisdictions. These provisions require that police make an arrest in domestic disputes when there is probable cause that an assault has occurred. Prior to these provisions, officers had increased discretion, and would often refuse to make an arrest unless they had actually seen the assault. Many believe that these provisions are necessary to protect victims and increase batterer accountability, but an unintended result has been an rise in the number of victim arrests. Although officers are supposed to determine the primary aggressor in the dispute, victims that have engaged in self-defense behavior are often arrested. Additionally, in some situations, officers are unable to identify the primary aggressor, and simply arrest both parties.

100. Hirst, *supra* note 8, at 135.

101. See CAL. CIV. CODE § 1951.2 (West 1970).

102. See CAL. CIV. CODE § 1946.7(d) (West 2008).

103. *Id.*

104. CAL. CIV. CODE § 1946.7(b)(1)-(2) (West 2008).

105. SCHULTZMAN, *supra* note 61, at 36.

106. See Schultzman, *supra* note 86.

107. SCHULTZMAN, *supra* note 61, at 33.

evict only the abuser in private housing.¹⁰⁸ Typically, a victim's only option is to seek a restraining order in which the judge requires the abuser to move out of the home, commonly called a "kick-out order."¹⁰⁹ This protection is given at the judge's discretion, and can be contested by the abuser, which often leaves a victim with few options to escape abuse without having to abandon her lease.¹¹⁰

A survey of the provisions discussed show that a victim of domestic violence may have difficulties securing and retaining housing. As discussed above, there are numerous reasons why a landlord would not want to rent to a victim. Noisy or even visible fights may scare other tenants. Prospective tenants likely do not want to live in a complex where domestic violence takes place. Landlords and other tenants may not want the police showing up on a regular basis. In short, a landlord is more likely to choose tenants without domestic violence issues even if they never articulate the reasoning behind this preference. This can be especially difficult for victims who live in areas with an affordable housing shortage, and where competition for each unit is fierce. These difficulties have not gone unnoticed by advocates, courts, and lawmakers, resulting in state and federal laws that specifically provide protections to victims. Additionally, state and federal fair housing and civil rights laws have been used to protect the housing rights of victims. In the following sections, I will discuss these laws and theories. I will show that some are more effective than others, and some actually are more harmful than beneficial.

108. See generally CAL. CIV. CODE § 1164 (West 1885); CAL. CIV. CODE § 1166a (West 2005).

109. See CAL. FAM. CODE § 6321 (West 1993).

110. See Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 52 (1989).

III. California Code of Civil Procedure Section 1161.3: A Solution or More Problems?

California has recently joined a growing number of states¹¹¹ that offers victims of domestic violence a defense to eviction in private housing.¹¹² The California statute became effective on January 1, 2011, and applies to leases entered into or renewed after that date.¹¹³ The statute prohibits a landlord from evicting a tenant or household member based on an act of domestic violence, sexual assault, or stalking if the victim has either a restraining order issued within the past 180 days, or a police report of the eligible incident within the past 180 days.¹¹⁴ The landlord is prohibited from evicting the victim only if the perpetrator named in the protective order is *not* a tenant, subtenant, lessee or sublessee of the unit, even if he is named in a restraining order.¹¹⁵ The statute has exceptions that allow landlords to proceed with eviction proceedings. For example, the landlord can evict if the tenant has already used these protections once and

111. E.g., COLO. REV. STAT. § 13-40-107.5(5)(c)(I) (2005); MINN. STAT. § 504B.205 (2000) (a landlord may not bar or limit a tenant "for calling for police or emergency assistance in response to domestic abuse or any other conduct"); N.M. STAT. ANN. § 47-8-33(J) (2001) ("In any action for possession [for substantial violation by another person in the unit or on the premises], it shall be a defense that the resident is a victim of domestic violence."); 1985 Op. N.Y. Att'y Gen. 45, Formal Op. No. 85-F15, 1985 N.Y. AG LEXIS 8 (refusal to rent to victims of domestic violence or requiring abused applicants to obtain a divorce from the abuser violates the state human rights law because of the disparate impact upon women); WASH. REV. CODE § 59.18.580 (2004) (providing tenants with a defense to eviction due to an act of domestic violence); WIS. STAT. § 106.50(5m)(d) (2000) ("No claim that an individual's tenancy would constitute a direct threat to the safety of other persons or would result in substantial damage to property may be based on the fact that a tenant has been or may be the victim of domestic abuse."). Despite the numerous statutes in several different states, there are not many cases, published or unpublished, showing how courts interpret the protections contained in the statutes. A Washington case, *Indigo Real Estate Services v. Rousey*, 151 Wash. App. 941, 945, 215 P.3d 977, 978 (Wash. Ct. App. 2009), does focus on a victim that relied upon the eviction protection statute. The court noted that as soon as the landlord was informed of the statute, he requested dismissal of the unlawful detainer action, which the court granted. This case was the only reported case located that deals with the operation of these statutes. This lack of case examples suggests that these actions simply do not make it to court, and if so, generally do not move past the trial court level. Landlords, when confronted with the law, may decide not to proceed with the eviction, or victims, unaware of the protections, may simply move out when evicted. Nevertheless, advocates need to be aware of this lack of history, and should be informed of the possible risks of relying on these types of statutes.

112. See CAL. CIV. PROC. CODE § 1161.3(a) (West 2011).

113. *Id.*

114. CAL. CIV. PROC. § 1161.3(a)(1)(B)(2) (West 2011).

115. CAL. CIV. PROC. § 1161.3(d) (West 2011).

continues to allow the perpetrator to visit the property.¹¹⁶ Additionally, the landlord can evict if he:

[r]easonably believes that the presence of the person against whom the protection order has been issued or who was named in the police report of the act . . . of domestic violence, sexual assault, or stalking poses a physical threat to other tenants, guests . . . or to a tenant's right to quiet possession.¹¹⁷

However, the statute also requires the landlord to give a three-day notice to the tenants to remedy the situation before evicting under one of the exceptions.¹¹⁸ This is not a "magic ticket" against evictions; landlords can still evict victims for violating other provisions of the lease. Landlords are only barred from evicting based upon acts directly relating to domestic violence; such as for excessive noise, or law enforcement visits to the home, or under a zero tolerance violence policy. Although the statute applies to all landlords, it is important to note that it mainly affects victims living in private housing. Victims residing in federally subsidized public housing can rely upon the protections in VAWA in addition to this statute.¹¹⁹

Although undoubtedly an important step towards providing critical protections that prevent housing issues for victims,¹²⁰ the statute has several serious shortfalls that may make it an example of good legislative intentions that increase difficulties for victims and advocates.¹²¹

First, the statute denies eviction protection if the tenant continues to invite the perpetrator to the premises. This clause in the statute demonstrates a fundamental misunderstanding of the nature of domestic violence. It particularly causes difficulties for victims with children, and sheds light on a clear contradiction in domestic

116. CAL. CIV. PROC. § 1161.3(b)(1)(A) (West 2011).

117. CAL. CIV. PROC. § 1161.3(b)(1)(B)(2) (West 2011).

118. CAL. CIV. PROC. § 1161.3(b)(2) (West 2011).

119. 42 U.S.C.A. § 1437d(l)(6) (West 2006).

120. SCHULTZMAN, *supra* note 61.

121. See Schultzman, *supra* note 86. In 2005, California assembly member Rebecca Cohn introduced AB 99, which extended the possible duration of restraining orders from three years to five years. The bill passed and amended CAL. FAM. CODE § 6345. Some advocates argue that although the amended reflected good intentions, the result was actually a disservice to victims. Some advocates found that judges would actually only grant restraining orders for a very short time, such as six months or a year when the victim's requested an order for the full five years. Advocates speculate that judges were hesitant to restrict the perpetrators civil liberty for a full five years; it simply seemed "too long" compared to the former three-year maximum.

violence law. Next, it is unclear what kind of showing a landlord will have to make to prove that he or she believes the perpetrator poses a threat to other tenants, or what constitutes a breach of the covenant of quiet enjoyment. A landlord could potentially evict a tenant under this exception as he could prior to the enactment of the statute. Next, the interpretation of the terms "tenant, subtenant, lessee, or sublessee" could result in only a very small number of victims relying on the statute for an affirmative defense to eviction, since victims often live with an abusers that is included on the lease. Additionally, the statute may preempt city housing ordinances that provide greater protections to victims.¹²² Finally, the statute can become an illusory protection if these limitations prove accurate; advocates and victims may rely upon the illusory protects at the expense of other theories that have proven successful.

A. A Misunderstanding of Domestic Violence, Contradictions in the Law, and Problems for Parents

Perhaps the most problematic portion of this statute is the exception that allows landlords to evict if the tenant has used the statute protection previously, and continues to allow the perpetrator to visit the premises.¹²³ Courts, landlords, and even advocates find it incredibly frustrating when a victim seems unwilling to help herself, and continuously returns to a relationship with the abuser and allows him to come back into her home. This frustration is understandable, but the victim's behavior reflects the common cycle of domestic violence.¹²⁴ A victim of continuous abuse has been isolated and manipulated into believing that she cannot survive on her own.¹²⁵ A batterer will use manipulation to prey upon and convince the victim to continue allowing the batterer into her home.¹²⁶ Instead, the law assumes that the victim has control over her batterer's behavior, and that the batterer will not come to the house without her invitation. Even if the victim is continuing to allow the batterer to visit, it may be a calculated decision to avoid separation abuse, or to continue receiving needed financial support for herself and her children.¹²⁷ The law does not reflect the true

122. Schultzman, *supra* note 86

123. See CAL. CIV. PROC. § 1161.3(b)(1)(A) (West 2011).

124. See generally WALKER, *supra* note 55.

125. *Id.*

126. *Id.*

127. Dutton, *supra* note 48, at 368.

complexity of a victim separating from her abuser, a process that can take months, and is nearly impossible to complete in many situations without support that is not often available.¹²⁸ A simple housing statute provision cannot solve domestic violence, but it fails to protect the protections it intends to when it is based on a fundamental misunderstanding of the way abusive relationships work.

Most scholars believe the only way to protect victims from future abuse is a complete separation from her abuser.¹²⁹ But what about women who want to stay with their partners, and simply want the violence to stop? "While their reasons may be emotional, economic, religious, cultural, or child-centered, the reality is that a substantial number of battered women have no intention of leaving their partners."¹³⁰ This statute contains provisions that punish women who attempt to keep their families together. A landlord can evict a victim if she reconciles with her partner, or works through problems by having her partner come to her home.¹³¹ Many argue that all of domestic violence law is designed upon the proposition that women will sever ties with their abusers,¹³² and this housing law reflects that goal. However, abusers convicted of domestic violence are often sentenced to complete a rehabilitation program.¹³³ Batterer intervention programs are generally court-mandated alternatives to incarceration, and provide counseling and education in an attempt to stop a batterer's violent behavior towards his partner.¹³⁴ Although there is disagreement about the effectiveness of these programs,¹³⁵ courts continue to sentence batterers to this type of treatment, reflecting the belief that in some cases, abusers can change their violent behavior.¹³⁶ The aforementioned housing provision is a direct contradiction to this premise. It does not make

128. See Sharan K. Suri, Note, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107, 128 (2000).

129. See generally Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

130. *Id.* at 20.

131. See CAL. CIV. PROD. CODE § 1161.3(b)(1)(A) (West 2011).

132. See generally Goodmark, *supra* note 129 (explaining that protective orders, mandatory arrest, and no drop policies are all reflective of the legal goal of separating victims from their abusers).

133. See generally Amanda Dekki, Note, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT 549 (2004).

134. *Id.* at 566.

135. *Id.* at 572-73.

136. *Id.* at 573.

sense for an abuser to complete and follow a treatment program whose goal is to keep a family together, if the family can be evicted as soon as the recovering batterer returns home.

Alternatively, many victims want nothing more than to sever all ties with their abusers, but cannot because they are the fathers of their children. In the absence of child abuse, courts will generally allow a father visitation with his children.¹³⁷ This housing statute presents a very practical problem for victims. An abuser may continue to visit the home for countless reasons; picking up and dropping off the kids, dropping off toys, diapers or other supplies, having discussions with his ex-partner about children's medical or school issues, or casual holiday visits. A landlord committed to evicting a certain tenant could use these visits in an attempt to rebut a victim's defense under the statute. It remains to be seen how courts will interpret these situations.¹³⁸ Ideally, advocates and lawyers will attempt to educate the court about domestic violence and parenting issues, and well-educated judges will not allow these visits to result in homelessness for the victim. Considering the historically uninformed treatment of domestic violence in the courts,¹³⁹ advocates and lawyers should be vigilant against attempts by landlords to use the exceptions to the statute in this way.

B. Other Tenants: Danger and Breach of the Covenant of Quiet Enjoyment

Under the statute, a landlord is able to evict if the batterer is believed to be a danger to other tenants or their guests, or who threatens another tenant's right to quiet enjoyment.¹⁴⁰ With the inclusion of this exception, it is tempting to ask what additional protection this statute provides. In many cases, landlords evict victims of domestic violence for these exact reasons; because landlords are concerned about liability if the abuser's violence harms other tenants or because an abusive relationship is noisy and frightening for other tenants in the complex.¹⁴¹ Ideally the statute's usefulness will arise from the presumption that landlords cannot evict based upon an act of domestic violence, and will require a stronger showing of danger to other tenants or interference to quiet

137. Levin, *supra* note 52.

138. See Schultzman, *supra* note 86.

139. See Griffith, *supra* note 33.

140. See CAL. CIV. PROD. CODE § 1161.3(b)(1)(B) (West 2011).

141. SCHULTZMAN, *supra* note 61.

enjoyment to rebut this presumption. Again, court treatment of these issues remains to be seen, but some guidance can be inferred from similar eviction proceedings.

Although these cases do not involve domestic violence, California courts have held that landlords are under a duty to exercise reasonable care to protect tenants against foreseeable criminal acts of third parties.¹⁴² These cases generally turn on whether the perpetrator's actions were foreseeable to the landlord.¹⁴³ For example, in *Madhani v. Cooper*, the court found that one tenant's repeated acts of assault and battery against another tenant were sufficient to render a future attack reasonably foreseeable, and that a reasonable landlord should have taken measures to prevent a future attack.¹⁴⁴ In this case, the court held that the landlord's knowledge of a specific tenant's propensity of violence towards other tenants led to a duty to remove that person from the premises.¹⁴⁵ It could follow that a landlord will have notice of an abusers vicious propensity if he continually batters his partner in a manner visible to other tenants. Presumably, the landlord will have the duty to remove him from the premises, even if it means evicting the victim.¹⁴⁶ However, other state courts have declined to find that an abuser's violent behavior towards his partner to be an indication that violence against other tenants is reasonably foreseeable. An analysis of a specific perpetrator's danger to other tenants is going to rely heavily upon the facts of that particular situation.¹⁴⁷ Case law in this area is limited, California courts could find that domestic violence is enough to show the "violent propensity" needed to make a future attack on other tenants reasonably foreseeable.¹⁴⁸ Advocates need to be aware of this possibility, and approach eviction cases under this statute with the information needed to contradict this assumption.¹⁴⁹ This may include evidence that the perpetrator "target[s] specific

142. See, e.g., *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 212 (Cal. 1993) (providing that a landlord has a "duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures").

143. Ross, *supra* note 5, at 253.

144. See *Madhani v. Cooper*, 130 Cal. Rptr. 2d 778, 780 (2003).

145. *Id.* at 781.

146. See, e.g., *Williams v. Gorman*, 520 A.2d 761, 765 (N.J. Super. Ct. App. Div. 1986) (offering a general example of a court's treatment of this issue).

147. See Ross, *supra* note 5, at 253 (discussing an example of a holding that was very dependent on the specific facts of the case).

148. See generally Ross, *supra* note 5.

149. Anne C. Johnson, Note, *From House to Home: Creating A Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859, 1864 (2006).

intimates or family members, not random individuals.”¹⁵⁰

The statute also provides an exception to the eviction defense if the landlord reasonably believes that the presence of the person named in the restraining order or police report will interfere with another tenant’s right to quiet possession.¹⁵¹ In other words, a landlord can rebut the tenant’s defense to eviction, if the acts of domestic violence interfere with other tenant’s quiet enjoyment of his home.¹⁵² It is not difficult to imagine the types of disturbances neighbors may report: screaming and shouting, breaking glass or furniture, and slamming doors frequently accompany family assaults.¹⁵³ Additionally, violence does not always remain confined to a victim’s own apartment, and viewing assaults in common areas of the complex can be frightening to other tenants. Case law is clear that:

[m]inor inconveniences and annoyances are not actionable breaches of the implied covenant of quiet enjoyment. To be actionable, the landlords act or omission [by not taking action against the tenant causing the disturbances] must substantially interfere with a tenants’ right to use and enjoy the premises for the purposes contemplated by the tenancy.¹⁵⁴

It is far from clear whether these common disturbances that accompany domestic violence are more than “minor annoyances.”¹⁵⁵ Although not directly on point, other state and federal courts have found that continuous loud music almost every night could constitute a constructive eviction of another tenant if the landlord did not remedy the noise.¹⁵⁶ Another decision suggests that screaming and slamming doors throughout the night resulting in numerous complaints could be a legitimate reason to evict a tenant.¹⁵⁷ These examples suggest that noise and fear from domestic

150. Johnson, *supra* note 149.

151. CAL. CIV. PROD. CODE § 1161.3(b)(1)(B) (West 2011).

152. See generally Ross, *supra* note 5, at 255–56.

153. See Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 10–11 (2006) (offers an account of an extremely violent, noisy, and destructive incident of domestic violence).

154. *Andrews v. Mobile Aire Estates*, 22 Cal. Rptr. 3d 832, 839 (Ct. App. 2005).

155. Ross, *supra* note 5, at 255–56.

156. See *Blackett v. Olanoff*, 358 N.E.2d 817, 818 (Mass. 1977).

157. See *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1041 (6th Cir. 2001). The apartment complex, a nonprofit organization providing housing to disabled individuals, evicted Groner due to excessive noise, including screaming and slamming doors at all hours. Groner was evicted, and challenged his eviction under the Fair Housing Act. The court held that the complex had met their burden in providing

violence may create actionable breaches.

It is also unclear what type of evidence landlords will have to present to prove their “reasonable belief” that a breach of other tenant’s quiet enjoyment will occur if he or she does not evict the victim.¹⁵⁸ Obviously this remains to be seen in the court’s treatment of specific cases brought under the statement. Landlords will likely be successful using this exception unless victims present substantial evidence that the perpetrator will not be returning to the premises, or that any noise from her apartment was an isolated incident. This may be a difficult showing, which will further reduce the protection the statute can provide.

C. Denial of Protection for Victims

Section 1161.3(a)(B)(2) provides that a victim can only use this defense to eviction if “the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence . . . is not a tenant of the same dwelling unit as the tenant or household member.”¹⁵⁹ This appears to exempt all victims that have signed a lease with their abuser. In addition to the difficulty a victim may have removing her abuser from the lease,¹⁶⁰ she may also be evicted from her home because the statute does not appear to protect victims in this situation.

Section 1161.3(d) provides that “for the purposes of this section, ‘tenant’ means tenant, subtenant, lessee, or sublessee,” clearly covering all express and contractual landlord-tenant relationships.¹⁶¹ This implies that a victim who allows her abuser to move in, without retaining express permission from her landlord or executing a new lease, will still be able to use the affirmative defense to eviction because her abuser is not an official tenant of her unit.¹⁶² However, California courts have held that a landlord-tenant relationship can be implied in the absence of a formal lease, by consent and acceptance of rent.¹⁶³ Whether consent and acceptance of rent creates a landlord-

accommodations required for protection of disabled persons under the Act, before evicting Groner, and approved summary judgment for the complex. This allows the inference that the complex was within their rights to evict an excessively noisy tenant that had numerous complaints from neighbors.

158. See CAL. CIV. PROD. CODE § 1161.3(b)(1)(B) (West 2011).

159. CAL. CIV. PROD. CODE § 1161.3 (a)(2) (West 2011).

160. See CAL. CIV. CODE § 1946.7(d) (West 2008).

161. CAL. CIV. PROD. CODE § 1161.3(d) (West 2011).

162. *Id.*

163. See, e.g., *Getz v. City of W. Hollywood*, 284 Cal. Rptr. 631, 633–34 (Ct. App.

tenant relationship depends on the particular circumstances of each case.¹⁶⁴ A landlord could argue that a victim is not entitled to the affirmative defense because he knew the abuser had moved in, and he accepted the rent check from the abuser several times. If the court accepts this argument, the protections of this statute may not apply to victims that are informally living with their partners.

D. City Ordinances: More Protective, But Possibly Preempted

Since there was not a statewide affirmative defense to eviction for domestic violence victims prior to January 2011, some cities in California enacted local ordinances creating this protection. An example of one is San Francisco Administrative Code Section 37.9.¹⁶⁵ This ordinance provides an affirmative defense when the eviction is based on an act of domestic violence against the tenant.¹⁶⁶ To prove abuse under this ordinance; a victim can provide a restraining order or police report (similarly to Section 1161.3), but also can use a statement from law enforcement, a social worker, or counselor.¹⁶⁷ If the victim has a restraining order, she can apply this defense as often as necessary, otherwise, she may only use the defense once in a five-year period.¹⁶⁸ The ordinance does not specify any exceptions to this defense, unlike Section 1161.3, providing greater protection to victims. It is unclear whether Section 1161.3 will preempt this ordinance,¹⁶⁹ but it is possible that advocates and victims will no longer be able to rely upon the protections in the administrative code. An exhaustive choice of law analysis is needed to provide a definitive answer to this question, but that is beyond the scope of this Note; however, advocates should be aware of this possibility.

1991) (explaining that a tenancy relationship can be created in the absence of a formal lease, if the landlord accepts the rent from and knows that an individual is residing in the home without being added to the lease).

164. Getz, 284 Cal. Rptr. at 633–34.

165. S.F., CAL., ADMIN. CODE § 37.9 (2004), <http://www.sfrb.org/Modules/ShowDocument.aspx?documentid=1498>.

166. *Id.*

167. *Id.*

168. *Id.*

169. See Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 14–15 (2004) (explaining the three basic ways a state statute can preempt a county ordinance or regulation: (1) by express statutory language; (2) by inferring state intent to completely occupy the field; or (3) by operational conflict, where partial preemption may occur if the effect of local law would conflict with the application of an applicable state statute. It is unclear how this analysis will affect section 1161.3 and S.F., CAL., ADMIN. CODE § 37.9.).

E. What Section 1161.3 Could Mean for Victims

It is important to recognize that any official, legislative recognition of the housing difficulties of domestic violence is a welcomed step forward. Despite these possible limitations, Section 1161.3 can provide protections for victims, as long as advocates and legal professionals are conscientious and careful when relying on this affirmative defense to a victim eviction. It is important to make sure that a client meets the criteria of the statute by not residing with her abuser or engaging in activity that could be construed as allowing the abuser to visit her property. Also, advocates should pay careful attention to court interpretation of some of the provisions of the statute as cases become available. Specifically, the court will need to determine who is a “tenant” of the victim’s dwelling under the statute. An abuser that has been staying with the victim for several months could be classified as a tenant under the statute, even if he has not signed the lease.¹⁷⁰ It is also unclear how landlords will have to show their “reasonable belief” that an abuser may be a danger to other tenants, or interfere with the quiet enjoyment of other tenants.¹⁷¹ Also, it is unclear how courts will determine what constitutes a tenant allowing a perpetrator to visit the premises, and what victim behaviors will allow the landlord to use this exception.¹⁷² Court interpretation of the statute will be the key to whether Section 1161.3 will provide actual and realistic protections to most victims.

In the meantime, Section 1161.3 can prove dangerous for victims if they rely upon the statute to prevent evictions, only to find out that they do not fit the specific criteria or that their landlord can successfully apply one of the exceptions to the defense. Victims, advocates, and legal professionals should not rely upon this statute to provide definitive protection for victims facing eviction proceedings at the expense of developing other more traditional strategies. In the next section, I will describe several of these traditional strategies that can be utilized for victims that may not benefit from the protections of Section 1161.3.

170. See *Getz v. City of W. Hollywood*, 284 Cal. Rptr. 631, 633–34 (Ct. App. 1991).

171. See CAL. CIV. PROC. CODE § 1161.3(b)(1)(B) (West 2011).

172. *Id.*

IV. Not to be Forgotten: Fair Housing Law Remedies and Traditional Advocacy

While Section 1161.3 may prove to be an effective solution, domestic violence survivors facing eviction and homelessness should not rely on it until the courts have interpreted the provisions of the statute. In the meantime, advocates and victims should continue to use traditional advocacy, and innovative legal strategies that have been successful in courts, such as sex discrimination claims under federal and state fair housing laws. These theories can be effective for residents of both public and private housing, but will likely be most useful in private housing since residents of public housing are protected under federal law.¹⁷³

A. Sex Discrimination Theories Under Fair Housing Statutes

Landlords of private housing complexes are required to comply with the Federal Fair Housing Act ("FHA"), which states that landlords cannot "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."¹⁷⁴ In California, the Fair Employment and Housing Act ("FEHA") also applies, and provides the same general protections,¹⁷⁵ along with several additional safeguards to tenants, including additional protected groups, and a slightly more expansive definition of housing.¹⁷⁶ "Victims of domestic violence" is not an expressly protected class under either law, but this group may still be able to use these laws to challenge evictions as a result of acts of violence committed against it.¹⁷⁷ This is a relatively new and novel approach, but it has been used successfully to challenge evictions

173. 42 U.S.C.A. §1437d(l)(6) (West 2006).

174. 42 U.S.C.A. § 3604(a) (West 1988).

175. See CAL. GOV'T. CODE § 12955 (West 2010).

176. SCHULTZMAN, *supra* note 61, at 40. Under FEHA, landlords are prohibited from discriminating against the same protected groups contained in FHA, and also are prohibited from discrimination based on ancestry, sexual orientation, marital status, and source of income. Additionally, FEHA typically applies to all types of housing that is not owner occupied, while FHA exempts owner occupied complexes with less than four units, and single family homes, unless the owner owns more than three houses at any time, and for certain private club housing. Both FEHA and FHA provide some exemptions to senior housing, and housing owned by religious groups.

177. *Id.* at 41.

using sex discrimination theories in state and federal courts.¹⁷⁸ Disparate impact and disparate treatment are the two major sex discrimination theories that can be used to challenge evictions and other housing discrimination theories against victims.¹⁷⁹ These theories can be claimed together or separately.¹⁸⁰

i. Disparate Impact Theory

Under disparate impact theory, a gender-neutral policy that can be statistically proven to have a greater negative impact on women than on men constitutes discrimination on the basis of sex. It is not necessary to demonstrate that the landlord intended to discriminate on the basis of sex in adopting the policy.¹⁸¹ This theory is especially effective in challenging housing policies, such as zero tolerance violence lease provisions, when a victim has been evicted due to her abuser committing a criminal act of domestic violence towards her.¹⁸² Advocates can argue that because these policies have a disparate impact on domestic violence victims, and most of the victims of domestic violence are women, these policies have disparate impact on women.¹⁸³ An example of a case that involved a disparate impact theory can be found in *United States v. CBM Group*.¹⁸⁴ In this case, Tiffanie Alvera was assaulted by her husband in her public housing unit in Oregon in 2001, and was subsequently evicted pursuant to a zero tolerance violence policy.¹⁸⁵ The hearing officer found that “the landlord’s policy of evicting the victim as well as the perpetrator of an incident of violence between household members had a disparate impact based on sex, due to the disproportionate number of female victims of domestic violence.”¹⁸⁶

178. SCHULTZMAN, *supra* note 61, at 41–42.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 45.

184. See *United States v. CBM Group*, HUDALJ 10-99-0538-8, at 1 (Apr. 13, 2001). For more information about this case, see also, *Alvera v CBM, Inc.* ACLU, available at <http://www.aclu.org/womens-rights/alvera-v-cbm-group-inc-et-al>.

185. *Id.* (Tiffanie was not a resident of traditional public housing, but did receive a rent subsidy under a state program, so her case was heard in a Housing and Urban Development hearing. Note that this case was in 2001, before the 2005 VAWA remedy became available).

186. SCHULTZMAN, *supra* note 61, at 45 (case settled before reaching a state or federal court).

ii. Disparate Treatment Theory

A victim may also have a claim based on a disparate treatment theory if she can prove that she was treated differently than similarly situated male tenants, or that the housing provider's action stemmed from gender-based stereotypes about battered women.¹⁸⁷ For example, a woman may successfully assert this theory if she is evicted because she was a victim of violence in her apartment, and a male neighbor is also attacked in his apartment but is not evicted.¹⁸⁸ This theory can also be used if the eviction is not as a result of violence. For example, a victim may assert this theory if she is evicted due to noisy fighting associated with domestic violence, while a male neighbor who has similar loud arguments is not evicted.¹⁸⁹ Women can also raise disparate treatment claims when landlords make stereotypical remarks about battered women based on sex.¹⁹⁰ In *Bouley v. Young-Sabourin*, the petitioner-victim was evicted from her apartment after her husband violently assaulted, and she filed a lawsuit on a sex discrimination theory.¹⁹¹ During deposition, her landlord said that she believed female victims of domestic violence are equally responsible for the abuse, and that she did not believe Mrs. Bouley was a victim because she did not seem concerned about her husband or in shock.¹⁹² Mrs. Bouley argued that her eviction was due to impermissible stereotypical beliefs regarding the characteristics of an innocent female victim of domestic violence.¹⁹³ The court found that Mrs. Bouley stated a claim for sex discrimination under FHA, and the case settled shortly thereafter.¹⁹⁴

Sex Discrimination claims under FEHA and FHA are a relatively recent approach to protecting the housing rights of victims, but the results so far have been promising. Scholars and advocates have heralded these approaches.¹⁹⁵ Advocates should continue to file claims of sex discrimination in housing cases involving victims of domestic violence to fully develop this area of

187. SCHULTZMAN, *supra* note 61, at 45

188. *See generally* CBM Group, *supra* note 18.

189. SCHULTZMAN, *supra* note 61, at 43.

190. *See generally* Bouley v. Young-Sabourin, 394 F. Supp. 2d 675 (D. Vt. 2005).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *State and Local Housing Protections for Domestic Violence Victims Gaining Momentum*, NAT'L HOUSING L. PROJECT (Sept. 2008), <http://nhlp.org/node/626>.

fair housing. Advocates and legal professionals should not use Section 1161.3 as an excuse to abandon these efforts that appear promising in protecting victims not only in California, but in other states that do not have statutory schemes similar to Section 1161.3.

B. Traditional Advocacy

Though not as exciting as a new and innovative legal sex discrimination theory, advocates should not forget about the traditional advocacy techniques relied upon prior to the enactment of Section 1161.3. A simple letter or phone call to a landlord can prove to be very effective when negotiating a housing issue on behalf of a client.¹⁹⁶ A landlord may be nervous about litigation, and may be more than willing to compromise with an advocate to find a way to keep a victim in her home. Advocates may attempt to “embarrass” a landlord into legal and moral behavior by contacting local media outlets and asking them to air or publish the victim’s story.¹⁹⁷ Advocates should consider whether a victim has a valid claim under another theory, such as disability accommodation laws, or sexual harassment, or another section of FEHA or FHA.¹⁹⁸

The strategy implemented will depend on the victim’s particular situation. It is also important to remember that the victim’s safety and that of her children is always the priority. Even if legal action can be taken to keep the victim in her home, her safety may be better served if advocates help her relocate. Moreover, a victim may not want to continue to live under a landlord who attempts to evict her. It is important to acknowledge that any statute that addresses domestic violence will add additional protection for victims. Section 1161.3 may provide protection in that landlords may realize that the law prohibits them from evicting tenants based on an act of abuse. Landlords may choose to work with victims to solve problems because they do not want to break the law, or do not want to face litigation that could result from the eviction. However, it is important for advocates and victims not to become overconfident about the protections that Section 1161.3 appears to provide without considering all of these possible actions.

196. SCHULTZMAN, *supra* note 61, at 50.

197. *Id.* at 82.

198. *Id.* at 50.

CONCLUSION

Domestic violence is a pervasive and insidious social problem that affects millions of women each year.¹⁹⁹ Victims of domestic violence are commonly evicted from their rental housing because of violence against them in their homes, and are often vulnerable to homelessness.²⁰⁰ Legal responses and official victim advocacy has improved over the past several decades, but there are still dangerous myths surrounding this issue.²⁰¹ Many legal professionals, including judges, often do not understand why a victim does not simply leave her abuser and become frustrated when the victim continuously returns to her batterer.²⁰² This frustration is often reflected in laws that are passed with the intention of providing victim protection. The California legislature passed Section 1161.3 in January, 2011, and prohibits landlords from evicting a victim because of an incident of violence against her.²⁰³ This is a positive step forward, but should not be relied upon as the definitive solution to evictions resulting from domestic violence. Advocates should continue to develop legal strategies that will keep victims from being evicted, and engage in traditional advocacy.²⁰⁴

Any legislative response is a welcome progression towards the recognition that domestic violence is a serious social problem, and that domestic violence victims are in need of protection. However, no single piece of legislation is going to be the solution, and advocates should be aware that Section 1161.3 may not solve housing issues for all victims. Advocates should continue to serve victims, keep their safety the top priority, and use traditional advocacy strategies. Section 1161.3 complements these tools, but it does not replace them.

199. Nath, *supra* note 3.

200. See generally U.S. CONFERENCE OF MAYORS, *supra* note 4; Hirst, *supra* note 8, at 132-33.

201. See Griffith, *supra* note 33.

202. See generally WALKER, *supra* note 55.

203. CAL. CIV. PROC. CODE § 1161.3(a) (West 2011).

204. See generally SCHULTZMAN, *supra* note 61.